Supreme Court, U.S.
FILED
JAN 3 2002
CLERK

(3)

No. 01-816

IN THE
Supreme Court of the United States

JOE HARRY PEGG,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

WILLIAM J. MERTENS*
HENRY W. ASBILL
WILLIAM B. MOFFITT
Asbill, Junkin, Moffitt & Boss, Chtd.
1615 New Hampshire Ave., NW, Suite 200
Washington, DC 20009
(202) 234-9000
Fax: (202) 332-6480

**Counsel of Record*

Dated: January 3, 2002

24/00

QUESTION PRESENTED

In the view of amicus, this case presents the following question, which is fairly included within the questions presented in the petition, *see* Supreme Court Rule 14.1(a):

What if any showing of prejudice does the Sixth Amendment require before a defendant may withdraw a guilty plea entered on the advice of an attorney who, a few days before trial, was informed by the prosecutors that if the defendant went to trial—but not if he plead guilty—they would move to disqualify the attorney because of his alleged participation in a criminal plot with his client to influence a key witness's testimony?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST
OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT

THIS COURT'S REVIEW IS NECESSARY BECAUSE THE ELEVENTH CIRCUIT'S MISAPPLICATION OF *CUYLER* AND *STRICKLAND* CONFLICTS WITH DECISIONS IN THREE OTHER CIRCUITS AND UNDERMINES DEFENDANTS' SIXTH AMENDMENT RIGHT TO ADVICE FROM UNCONFLICTED COUNSEL BEFORE PLEADING GUILTY. 6

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Cuyler v. Sullivan, 446 U.S. 335 (1980) .. 2, 5, 8, 11, 14, 17, 18

Frazier v. United States, 18 F.3d 778 (9th Cir. 1994) 18

McMann v. Richardson, 397 U.S. 759 (1970) 9

Stoia v. United States, 22 F.3d 766 (7th Cir. 1994) 18

Strickland v. Washington, 466 U.S. 668 (1984) .. 2, 8, 10, 18

United States v. Cancilla, 725 F.2d 867 (2nd Cir. 1984) 6, 13

United States v. Fulton, 5 F.3d 605 (2nd Cir. 1993) 6, 13

United States v. Mett, 65 F.3d 1531 (9th Cir. 1995) 18

United States v. Miskinis, 966 F.2d 1263 (9th Cir. 1992) 18

Wood v. Georgia, 450 U.S. 261 (1981) 8, 14

Statutes and Rules

28 U.S.C. § 2255 ..... 3, 4, 8

Rules Regulating the Florida Bar, Rule 4-8.3(a) 11

Supreme Court Rule 14.1(a) i

Supreme Court Rule 37.3(a) 1

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than ten thousand members nationwide and twenty-eight thousand affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates. The NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The NACDL is committed to preserving fairness within the American criminal justice system. The NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among the NACDL's objectives are to

---

[1] In accordance with Supreme Court Rule 37.6, amicus curiae represents that no party other than counsel for amicus authored this brief in whole or in part, and no person or entity, other than amicus and counsel, have made a monetary contribution to the preparation or submission of this brief. The petitioner and respondent have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court, pursuant to Supreme Court Rule 37.3(a).

ensure that appropriate measures are taken to safeguard the rights of all person involved in the criminal justice system and to promote the proper administration of justice.

SUMMARY OF ARGUMENT

Certiorari should be granted because the Eleventh Circuit has adopted a standard that seriously misapplies this Court's decisions in *Strickland v. Washington*, 466 U.S. 668, 692 (1984), and *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980), regarding the showing that a defendant must make when seeking to withdraw a guilty plea on the ground that defense counsel's personal interests conflicted with the legal interests of his client when the lawyer advised the client to plead guilty. *Strickland* and *Cuyler* require only a showing that an actual conflict of interest adversely affected some aspect of the attorney's performance. The Eleventh Circuit, though it used language from *Cuyler*, in reality has adopted what amounts to an outcome-determinative standard that this Court has rejected for Sixth Amendment claims based on defense counsel's conflict of interest. The Eleventh Circuit's standard, as applied, required a defendant to demonstrate that, but for counsel's conflict, the defendant would not have plead guilty.

In the present case, the government conceded and the lower courts found that petitioner's lead trial

attorney, James E. Sharp, was laboring under a conflict of interest when he advised petitioner to plead guilty. Just a few days before trial, the prosecutor notified Sharp that unless his client entered a guilty plea, the office of the United States Attorney would seek Sharp's disqualification and that of his law partners. A prosecutor provided Sharp a draft motion, which accused the lawyer of conspiring with petitioner to suborn perjury and obstruct justice by having a government witness testify falsely in petitioner's favor.

Sharp had been preparing for trial, but his efforts abruptly changed. The day of trial, he sought a continuance to work out arrangements for a guilty plea, and the court granted the defense 24 hours. Sharp then advised petitioner to change his plea, and the next day, on counsel's advice, petitioner plead guilty. Sharp later denied placing his own interests ahead of his client's when he gave this advice, but he admitted considering his own interests as well.

Petitioner subsequently sought to withdraw his guilty plea. The court of appeals affirmed the district court's denial of relief under 28 U.S.C. § 2255 on the ground that petitioner failed to demonstrate prejudice from the conflict under Eleventh Circuit precedent that required, among other things, a showing that "the attorney's actual conflict adversely affected the defendant's decision to plead guilty." (App. B-11) The

Eleventh Circuit constructed an alternative explanation for defense counsel's advice and petitioner's decision to plead guilty. According to the Eleventh Circuit, the guilty plea could be attributed to a deal by an alleged co-conspirator, Bernie Getchman, to become a government witness against petitioner.

The petition shows that the court of appeals has seriously misread the record. Getchman made no deal, and in this and other important ways, the decision of the court of appeals rests on clearly erroneous findings.

More fundamentally, the decision of the court of appeals misapplied *Cuyler* and *Strickland*, and conflicted with decisions of the Second, Seventh, and Ninth Circuits. It was not petitioner's burden to show that, but for his attorney's conflict, he would not have plead guilty. At most, he needed to show that Sharp's conflict adversely affected the attorney's performance, as it plainly did. The conflict had a direct impact on Sharp's representation of petitioner as he immediately changed gears from preparing for trial to advising petitioner to plead guilty. The timing of this change could not have been coincidental. Because of the conflict, Sharp was unable to give unconflicted advice whether petitioner should stand trial or plead guilty. Instead, Sharp gave advice that was irredeemably tainted by Sharp's own desire to protect his reputation if not also his livelihood and freedom. Testifying at the § 2255 hearing, Sharp

admitted that self-preservation was a consideration when he advised petitioner to plead guilty.

The petition makes a strong argument for a *per se* rule similar to one that the Second Circuit has adopted, requiring no further showing of prejudice when defense counsel is accused of participating with his client in crimes related to those that are before the court. In the view of the NACDL, however, it is sufficient for this case to state a rule that will apply more generally to cases where defense counsel had an actual conflict of interest when advising their clients to plead guilty. The NACDL recommends that the Court hold that a defendant should be allowed to withdraw a guilty plea when (1) the lead defense attorney developed a real and substantial conflict of interest in the form of a personal interest in avoiding trial, (2) the attorney nonetheless advised the client to plead guilty, (3) the attorney considered his own conflicted interest when he gave that advice, and (4) the client then accepted the lawyer's advice by pleading guilty. This standard is faithful to *Cuyler* and consistent with the understanding of *Cuyler* in other Circuits. Unlike the Eleventh Circuit's test, it will protect a defendant's right to conflict-free advice of counsel before taking the momentous step of waiving trial and entering a guilty plea.

ARGUMENT

THIS COURT'S REVIEW IS NECESSARY BECAUSE THE ELEVENTH CIRCUIT'S MISAPPLICATION OF *CUYLER* AND *STRICKLAND* CONFLICTS WITH DECISIONS IN THREE OTHER CIRCUITS AND UNDERMINES DEFENDANTS' SIXTH AMENDMENT RIGHT TO ADVICE FROM UNCONFLICTED COUNSEL BEFORE PLEADING GUILTY.

The NACDL joins petitioner in requesting that certiorari be granted. The case presents important questions concerning the requirements of the Sixth Amendment when the personal interests of defense counsel conflict with those of the client on whether the client should stand trial or plead guilty. The courts of appeals have taken inconsistent approaches regarding similar conflicts of interest between defense attorneys and their clients. The approach of the Eleventh Circuit in this case conflicts with that of the Second Circuit in *United States v. Fulton*, 5 F.3d 605 (2nd Cir. 1993), and *United States v. Cancilla*, 725 F.2d 867 (2nd Cir. 1984). Whatever the correct standard may be, the Eleventh Circuit's standard must be wrong if it lets petitioner's guilty plea stand despite his lead counsel's acknowledgment that he considered his own self-interest in avoiding a formal accusation at trial of criminal and unethical conduct by the office of the U. S. Attorney, when this lawyer advised petitioner to plead guilty.

The conflict here between counsel's own interest in self-preservation and his client's right to disinterested advice hardly could have been more acute. Ten days before trial, prosecutors informed petitioner's lead trial attorney that the United States would seek to disqualify him and his partners from representing petitioner at trial. The prosecutors gave Sharp a copy of a draft disqualification motion accusing him of acting unethically and criminally by plotting with petitioner to encourage a key witness in this case, Reggie Baxter, to perjure himself before the grand jury and at trial to help petitioner escape conviction. The prosecutors told Sharp, however, that if petitioner waived trial by pleading guilty, then they would not seek disqualification (and the accusation against Sharp thus might never be made public).

Until then, petitioner had steadfastly demanded trial. Days earlier, he told the prosecutors that he rejected any plea bargain. But when Sharp appeared in court on the day of trial, November 28, 1994, he asked for a 10-day continuance so that a guilty plea could be worked out. Without contradiction, defense witnesses at the § 2255 hearing later testified that petitioner was surprised by this turn. The court granted Sharp just 24 hours. Sharp then counseled petitioner to accept a hastily negotiated plea bargain, and the next morning, petitioner entered a guilty plea upon Sharp's advice.

The Court's decisions establish a distinct test for whether a conflicted criminal defense attorney's representation satisfied the Sixth Amendment right to representation by counsel. In order to show a Sixth Amendment violation, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)). In *Wood v. Georgia*, 450 U.S. 261 (1981), the Court applied this rule in a case where the defendants' employer, an adult book store, paid their attorney's fees in a prosecution arising out of their employment. The Court stated that because of this arrangement, the lawyer "may not have pursued their interests single-mindedly," *id.* at 271-72, and it remanded the case for findings on "whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him." *Id.* at 272.

At the hearing in the district court on petitioner's request under 28 U.S.C. § 2255 to vacate his conviction by withdrawing his guilty plea, Sharp insisted that notwithstanding the prosecutors' threat to lodge a formal accusation against him personally of unethical and criminal conduct if petitioner exercised his right to stand trial, Sharp put his client's interests first in urging petitioner to plead guilty. Sharp nonetheless conceded that he considered this personal threat when he advised

his client to plead guilty, and it could hardly have been otherwise.

No one would deny the vital importance of counsel's advice when a defendant pleads guilty. A guilty plea is a comprehensive waiver of trial rights, and the decision to plead guilty is the most important and often the hardest decision a criminal defendant makes about the case. In *McMann v. Richardson*, 397 U.S. 759 (1970), the Court explained that "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments." *Id.* at 769. Much rests on counsel's opinion of untested and often uncertain evidence and witnesses, subjective and uncertain though that opinion may be:

> Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? . . . Questions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be.

Id. at 769-70.

Especially in view of the nature of counsel's task, a defendant is entitled to his attorney's single-minded loyalty when the attorney advises the client to plead guilty. *Cf. Strickland v. Washington*, 466 U.S. at 692 (duty of loyalty is "perhaps the most basic of counsel's duties"). Moreover, unlike many strategic and tactical decisions a lawyer must make in the course of trial, the decision to plead guilty or stand trial is uniquely and emphatically the defendant's. When, as here, the attorney has strong personal reasons to forego trial, there is a grave risk that those interests will color the attorney's judgment about whether the defendant should plead guilty or stand trial, and also color how the lawyer explains that advice. Conceivably, an attorney may believe sincerely that he can put his personal concerns aside and render disinterested advice despite the attorney's own strong interest not to go to trial. Or, after the fact, the attorney may rationalize that he did put his own concerns aside. But human nature being what it is, even among lawyers, the risk is too great that the attorney's judgment will be colored even if the specific taint is hard to pin down.

For reasons such as this, the petitioner has urged the Court to adopt a *per se* rule to allow a defendant to withdraw a guilty plea, if, when his lawyer advised him to plead guilty, the attorney was laboring under an actual conflict between the attorney's own interests and those of the client. Petitioner would not require any further

showing that the "conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. at 348.

The argument in favor of such a *per se* rule is strong. Prejudice is quite probable in this situation, but lawyers may be unlikely to admit that they let their personal interests taint their advice, and the courts are poorly equipped to discern an attorney's actual frame of mind and motivations in making a subjective judgment on the merits of going to trial versus pleading guilty. Moreover, the conflict of interest is utterly avoidable in a case such as this. The prosecutors were responsible for setting up Sharp's conflict, at least in the form that it took. They threatened to accuse Sharp, in a public filing, of criminal and unethical conduct, with potentially devastating consequences for his reputation and career if not also his liberty, if petitioner went to trial. But they made clear that they would turn a blind eye to Sharp's alleged wrongdoing if petitioner plead guilty. Whatever the prosecutors' motivations may have been,[2] their threat

---

[2] Rule 4-8.3(a) of Rules Regulating the Florida Bar provides that "A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority." The

(continued...)

created a powerful incentive for Sharp to have petitioner change his plea. They then exacerbated the problem—or at least failed to mitigate it—by failing to inform the court of their concerns about Sharp and the threat to move for disqualification if petitioner went to trial.

Further, even after the prosecutors created the conflict by their contingent threat, Sharp may have avoided giving petitioner conflicted legal advice if he and his firm had withdrawn from advising petitioner at all on whether he should plead guilty, leaving that to

---

[2](...continued)
prosecutors never gave a coherent explanation why, if they believed there was credible evidence of the serious misconduct that they described in the draft disqualification motion, they ignored it once petitioner entered his guilty plea.

Assuming the *bone fides* of the prosecutors' allegations against Sharp, even if in the end those allegations were in error, the prosecutors performed a disservice to the trial court and justice, as well as to petitioner's constitutional rights, when they made the disqualification motion contingent on petitioner's decision to stand trial. The prosecutors gave Sharp a route of escape and in doing so placed enormous pressure on him to have petitioner plead guilty. Many lawyers could find such pressure irresistible. And by holding back the disqualification motion until petitioner decided whether to plead guilty, the prosecutors made it harder or impossible for the trial court to investigate and resolve the issue in a more timely and less prejudicial way.

unconflicted local counsel (assuming, at least, that local counsel had comparable knowledge of the case and was not beholden to Sharp, who had retained him).

This *per se* approach essentially follows the Second Circuit's approach in *United States v. Fulton*, 5 F.3d at 610, and *United States v. Cancilla*, 725 F.2d at 870, when a government witness claims at trial that defense counsel participated in crimes related to the charges against the defendant at that trial. Unless the witness's allegations have been shown in a timely way to be patently and demonstrably false, the Second Circuit treats the resulting conflict of interest as *per se* prejudicial. This kind of conflict pits the attorney's own instinct for self-preservation against the client's interest in undivided loyalty and threatens to color the attorney's conduct of the entire trial. Even if the defendant later is unable to show specifically how the attorney's performance was adversely affected, the Second Circuit presumes prejudice.

In the view of the NACDL, it is, however, unnecessary in the present case to use a *per se* rule. Petitioner should be allowed to withdraw his guilty plea because (1) his lead trial attorney developed a real and substantial conflict of interest when the attorney developed a personal interest in avoiding trial, (2) the attorney nonetheless advised his client to plead guilty, (3) the attorney considered his own personal interest when

he gave that advice, and (4) the client then accepted the lawyer's advice by pleading guilty. In other words, the fact that the attorney had his personal interests in mind, and considered them, when advising the defendant to plead guilty makes a *per se* rule unnecessary. This circumstance is sufficient to show, under *Cuyler*, that the conflict adversely affected the lawyer's performance, by making the advice less than disinterested. On the other hand, if because of remoteness of the conflict or for some other reason, there is no direct or circumstantial evidence that the attorney actually considered his own interest when advising the defendant to plead guilty, then the plea may stand because an adverse effect has not been shown. In that circumstance, the lawyer did in fact pursue the client's interests "single-mindedly," *Wood v. Georgia*, 450 U.S. at 272, and the defendant received the dispassionate advice that the Sixth Amendment guarantees. To be sure, in a case where defense counsel faces formal accusation of criminal wrongdoing if the case goes to trial, the outcome nearly always would be the same whether this test or a *per se* rule applies. A lawyer rarely if ever could put such a risk out of mind or fail to consider it. Nonetheless, the proposed test requires a showing and does not just presume *Cuyler*'s requirement that the conflict adversely affected the attorney's performance.

In the view of the NACDL, the petition for certiorari shows convincingly why the Eleventh Circuit's

approach is unsound. The Eleventh Circuit required petitioner to make a showing that is difficult to distinguish from a but-for causal connection between Sharp's conflict and petitioner's decision to plead guilty. Relying on prior Eleventh Circuit precedent, the court said that petitioner needed to show

> (1) the existence of a plausible alternative defense strategy or tactic that might have been pursued; (2) that the alternative strategy or tactic was reasonable under the facts; and (3) a link between the actual conflict and the decision to forgo the alternative strategy of defense. . . . If there is a guilty plea involved, this Court looks at whether the attorney's actual conflict adversely affected the defendant's decision to plead guilty.

(App. B-10 to B-11)

The court then concluded that even if Sharp was free of his conflict of interest, his advice would have been the same, and petitioner would have entered a guilty plea anyway, or at least that petitioner failed to show otherwise. (App. B-11 to B-12)

The petition shows that courts are ill equipped to make such an inquiry regarding the connection between

an attorney's conflict and the defendant's decision to plead guilty, as the Eleventh Circuit's decision itself illustrates. The court's decision to deny petitioner relief rests on three clearly erroneous assertions about the case: (1) The Eleventh Circuit believed that the plea arrangement was the creation of petitioner's local counsel, John Fitzgibbons, not Sharp, but Fitzgibbons himself testified that Sharp devised the deal. (2) The Eleventh Circuit believed that all of petitioner's attorneys agreed that petitioner should plead guilty, but in fact, Paul Knight, one of Sharp's partners, believed that the plea was improvident because petitioner could not meet its terms (especially a promise to forfeit assets of a specific value), and Knight so advised Sharp.[3] (3) The Eleventh Circuit believed that before petitioner entered his plea, an alleged co-conspirator, Bernie Getchman, had agreed to testify for the government, but he had not. This third point is especially critical. The Eleventh Circuit's opinion acknowledged that until Sharp received the draft disqualification motion, petitioner's attorneys "were preparing to go to trial and did not intend to enter a guilty plea." (B-6) The court of appeals seems to have concluded that the "link" it required between Sharp's conflict and petitioner's guilty plea cannot be shown,

---

[3] Knight's concern was well placed. Petitioner was unable to forfeit the $4 million in assets that the government wanted, and at sentencing petitioner was found in violation of the plea agreement for this reason.

because petitioner must have plead guilty in response to Getchman's defection rather than Sharp's predicament. The petition shows that the court of appeals erred in believing that there even was a defection.

In any event, *Cuyler* rejects an outcome-based prejudice standard such as the Eleventh Circuit employed, when defense counsel labors under an actual conflict of interest, as Sharp did. *Cuyler* requires only that the defendant "demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. at 348.[4] Sharp was unable to render disinterested advice on whether petitioner should plead guilty, and when he advised petitioner to plead guilty, Sharp admittedly considered his own compelling, personal interest that petitioner do so. This all that *Cuyler* requires for a valid Sixth Amendment claim.

---

[4] The Eleventh Circuit required a showing that Sharp's conflict "adversely affected *the defendant's decision to plead guilty*" (App. B-10 to B-11; emphasis supplied), while *Cuyler* required only a showing that a conflict "adversely affected *[the] lawyer's performance*." 446 U.S. at 348 (emphasis supplied). The Eleventh Circuit's substitution of the defendant's decision for the lawyer's performance clearly conflicts with *Cuyler* and constitutes an outcome determinative test that the Court expressly rejected in both *Cuyler* and *Strickland* for a Sixth Amendment claim based on counsel's conflict of interest.

The petition explains that the Eleventh Circuit's view of the *Cuyler* standard conflicts with the view of the Seventh Circuit in *Stoia v. United States*, 22 F.3d 766, 771 (7th Cir. 1994) ("a [reasonable] likelihood that counsel's performance would have been different"), and the Ninth Circuit in *Frazier v. United States*, 18 F.3d 778, 787 (9th Cir. 1994) (quoted in *Stoia*), *United States v. Mett*, 65 F.3d 1531, 1535 (9th Cir. 1995) ("need only show that some effect on counsel's handling of particular aspects of the trial was likely"), and *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992) (quoted in *Mett*).

CONCLUSION

Certiorari should be granted to review the decision of the Eleventh Circuit. That decision conflicts with decisions in the Second, Seventh, and Ninth Circuits and misapplies this Court's decisions in *Cuyler v. Sullivan* and *Strickland v. Washington*. This Court's guidance is needed on the question of the showing that is required when a defendant claims that defense counsel's conflict of interest rendered the attorney's advice to plead guilty constitutionally deficient

Dated: January 3, 2002

Respectfully submitted,

WILLIAM J. MERTENS*
HENRY W. ASBILL
WILLIAM B. MOFFITT
Asbill, Junkin, Moffitt & Boss, Chtd.
1615 New Hampshire Ave., NW, Suite 200
Washington, DC 20009
(202) 234-9000
Fax: (202) 332-6480

Counsel for Amicus Curiae the National Association of Criminal Defense Lawyers

**Counsel of Record*